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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GLOBE LIFE AND ACCIDENT INSURANCE COMPANY,

Petitioner,

v.

**STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,**

Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of Oklahoma**

BRIEF FOR RESPONDENT

DAVID ALLEN MILEY
Assistant General Counsel
(Counsel of Record)
CHRISTY J. CAESAR
Assistant General Counsel
DAVID HUDSON
General Counsel
OKLAHOMA TAX COMMISSION
Post Office Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorneys for Respondent

15pp

QUESTION PRESENTED

Whether a full hearing before the Oklahoma Tax Commission on Petitioner's claim for refund and full review of the Commission Order denying said claim by the Oklahoma Supreme Court satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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BRIEF FOR RESPONDENT

REASONS WHY PETITION SHOULD BE DENIED

I. PETITIONER HAS FAILED TO SET FORTH A COMPELLING REASON WHICH MERITS SUPREME COURT REVIEW.

Although Petitioner cites Section 1257(a) of Title 28 of the United States Code in its jurisdictional statement as granting jurisdiction to this Court, Petitioner fails to recite any of the grounds enumerated therein. Without making specific reference in its petition to Rule 10 of the *Rules of the Supreme Court*, Petitioner states as the reason for review that the Oklahoma Supreme Court has decided a federal question in a way that conflicts with the decisions of this Court. In support thereof, Petitioner alleges that its due process rights were denied at the

administrative level when the Oklahoma Tax Commission treated Attorney General's Opinion No. 88-34 as dispositive of the issue of the sales taxability of insurance companies. Petitioner further alleges that its due process rights were denied when the Oklahoma Supreme Court failed to address whether this treatment by the Oklahoma Tax Commission was violative of its constitutional rights. Although Petitioner has alleged the denial of due process as stated above, Petitioner fails to cite any authority of this Court supportive of these allegations.

Petitioner misstates the holding of the Oklahoma Supreme Court on the binding effect of an opinion of the Oklahoma Attorney General on the actions of the Oklahoma Tax Commission. In *Globe Life and Accident Insurance Co. v. Oklahoma Tax Commission*, 831 P.2d 649, 650 (Okla. 1992), the Oklahoma Supreme Court, citing its holding in *Branch Trucking v. Oklahoma Tax Commission*, 801 P.2d 686 (Okla. 1990), stated that "[a]n Attorney General's Opinion is binding on state officials *until a court of competent jurisdiction renders an inconsistent decision*." (emphasis added). Under this holding, the Oklahoma Supreme Court had the opportunity and authority to render invalid Attorney General's Opinion No. 88-34. However, the Oklahoma Supreme Court, in considering the taxability issue instead agreed with the opinion of the Attorney General thereby effectuating plenary review.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS YIELDING THE DECISION INAPPROPRIATE FOR SUPREME COURT REVIEW.

The general rule regarding Supreme Court review of state court decisions is that review is inappropriate where the state court decision rests on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

In the case at bar, the Oklahoma Supreme Court decided that insurance companies are not exempt under Oklahoma law from paying sales tax when acting as a purchaser of goods and services. This holding was based solely upon state law. Thus, the decision rested on adequate and independent state grounds. In its opinion, the Oklahoma Supreme Court stated that the instant case was controlled by *Branch Trucking* and *Professional Investors Life Insurance Co. v. Oklahoma Tax Commission*, 825 P.2d 1292 (Okla. 1991), the companion case of *Globe*.

In *Professional Investors*, the court held that the purchase of electricity by an insurance company was subject to sales tax pursuant to Section 1354 of the Oklahoma Sales Tax Code. *Professional Investors* at 1293. The court also examined the exemptions enumerated in the Oklahoma Sales Tax Code and found that none of the exemptions were applicable to the transactions at issue. Id. at 1295.

The court further found that the "in lieu of" tax provision of the Oklahoma Insurance Code did not relieve insurance companies from the imposition of sales tax on their purchases of goods and services. Okla. Stat. tit. 36, § 624 (Supp. 1988) provides as follows:

> For all insurance companies or other entities taxed pursuant to this section, the annual license fee and tax and all required membership, application, policy, registration, and agent appointment fees shall be in lieu of all other state taxes or fees, ...

The court found that the payment of fees and taxes imposed by the aforementioned section of law is not in lieu of sales tax where an insurance company is acting as a purchaser of goods or services and a sales tax would otherwise be imposed. The court based this finding on its agreement with the rationale of Attorney General's Opinion No. 88-34 and its prior holding in *New York Life Ins. Co. v. Board of County Commissioners*, 155 Okla. 247, 257, 9 P.2d 936, 943 (1932), that the annual premium tax is "only in lieu of all other licenses or privilege fees or agency taxes."

The Oklahoma Supreme Court, in the *Globe* opinion, found that the Oklahoma Tax Commission properly followed the opinion of the Attorney General, citing *Branch Trucking*. *Globe* at 651. In *Branch Trucking*, the Oklahoma Supreme Court stated:

> The Attorney General is the 'chief law officer' of Oklahoma. Since 1919, the Attorney General's opinions have been binding on state officials unless the opinion is inconsistent with a final determination of a court of competent jurisdiction.

Branch Trucking at 690.

However, in *Globe*, the Oklahoma Supreme Court also held that the Petitioner was appropriately required to pay sales tax on its purchases. *Globe* at 650. Because the Oklahoma Supreme Court found the tax to be appropriate, the issue of the binding effect of the Attorney General's opinion is moot.

The opinion of the Oklahoma Supreme Court in the case at bar was supported by adequate and independent state grounds since the decision was based on state law and other Oklahoma Supreme Court cases. Therefore, the decision of the Oklahoma Supreme Court is inappropriate for Supreme Court review.

III. PETITIONER WAS AFFORDED PROCEDURAL DUE PROCESS BEFORE THE OKLAHOMA TAX COMMISSION AND ON APPEAL TO THE OKLAHOMA SUPREME COURT.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Petitioner was afforded and exercised an opportunity to challenge the imposition of the tax before the Administrative Law Judge of the Oklahoma Tax Commission and on review before the Oklahoma Supreme Court.

Oklahoma's Uniform Tax Procedure Code (the "Code"), Okla. Stat. tit. 68, § 201 *et seq.*, (1981) establishes the remedies and procedures for challenging the State's tax laws and their enforcement. The Code specifically empowers the Oklahoma Tax Commission to hear and determine tax controversies. The relevant Oklahoma tax procedure statutes, Okla. Stat. tit. 68, §§ 225, 227 and 228 (1981) are set forth in Appendix A to this brief.

The Code gives a taxpayer who has made a claim for refund the right to a full oral hearing before the Oklahoma Tax Commission in which all arguments and authority may be presented. Okla. Stat. tit. 68, § 227 (1981). Moreover, the Code gives an aggrieved taxpayer the right to appeal from a final order of the Oklahoma Tax Commission directly to the Oklahoma Supreme Court. Okla. Stat. tit. 68, § 225 (1981).

The adequacy of the administrative process afforded by the Code was considered by the Tenth Circuit in the case of *Cities Service Gas Co. v. Oklahoma Tax Commission*, 656 F.2d 584 (10th Cir. 1981) *cert. denied*, 454 U.S. 1124 (1981). In *Cities Service*, plaintiff brought action in the United States District Court contesting the constitutionality of a state tax statute. The United States District Court dismissed the action for lack of subject matter jurisdiction stating as its reason that plaintiff had a plain, speedy and efficient remedy in the state courts. Id. at 586. Plaintiff appealed the dismissal to the Tenth Circuit alleging that a full and fair hearing may not be available in the Oklahoma state

court due to a prior Oklahoma Supreme Court decision which upheld the constitutionality of the tax in question. In affirming the dismissal, the Tenth Circuit concluded that Oklahoma's statutory remedies for challenging the state's tax laws "meet the requirements set out by this Court that the state procedural remedy provide the opportunity for a 'full hearing and judicial determination' of the Plaintiff's claim." Id. at 587.

To satisfy the requirements of due process in cases involving a postdeprivation refund action, a state must provide taxpayer with not only a fair opportunity to challenge the validity of the tax obligation but also a clear and certain remedy designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property. *McKesson v. Division of Alcoholic Beverages and Tobacco*, ____ U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). The Oklahoma statutory scheme provided Petitioner with a clear and certain remedy. In the event Petitioner had prevailed before the Oklahoma Tax Commission, or on appeal to the Oklahoma Supreme Court, Petitioner would have received a full refund of sales tax paid pursuant to Section 228 or 225, respectively.

The state procedural remedy of which Petitioner availed itself provided an opportunity for a full hearing and judicial determination of Petitioner's claim. Moreover, had Petitioner prevailed upon administrative or judicial review, the sales tax paid under protest would have been fully refunded affording Petitioner a clear and certain remedy. In accordance with the authorities cited above, further review by this Court is not warranted.

CONCLUSION

The decision of the Oklahoma Supreme Court is inappropriate for review by this Court. The Oklahoma decision was supported by, and in conformity with, state law and prior Oklahoma Supreme Court cases. Thus, the decision rested on adequate and independent state grounds.

The requirements of due process were fully satisfied under the Oklahoma statutory scheme of review. Petitioner was provided a fair opportunity to challenge the validity of the tax and availed itself of that opportunity. Had Petitioner prevailed, the sales tax paid under protest would have been fully refunded, providing Petitioner with a clear and certain remedy.

Since the opinion of the Oklahoma Supreme Court was based solely on state grounds, and the statutory scheme of review provided full opportunity for

hearing and a clear and certain remedy, no compelling reason exists to merit Supreme Court review.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

David Allen Miley
Assistant General Counsel
(Counsel of Record)
Christy J. Caesar
Assistant General Counsel
David Hudson
General Counsel
OKLAHOMA TAX COMMISSION
Post Office Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorneys for Respondent

APPENDIX A

Oklahoma Uniform Tax Procedure Code,
Okla. Stat. tit. 68 (1981):

§ 225. Appeals.

(a) Any taxpayer aggrieved by any order, ruling, or finding of the Tax Commission directly affecting such taxpayer may appeal therefrom directly to the Supreme Court of Oklahoma. A taxpayer so desiring to appeal shall, within ten (10) days from the date of mailing to the taxpayer of any such order, ruling, or finding, file with the Tax Commission a written notice of his intention to appeal.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling, or finding complained of, the taxpayer desiring to appeal shall file in the office of the Clerk of the Supreme Court a petition in error specifying the grounds upon which such appeal is based. At the same time the taxpayer shall request that the Tax Commission prepare for filing with the Supreme Court, within thirty (30) days, the record of the appeal, certified to by the Secretary of the Tax Commission, and consisting of any citations, findings, judgments, motions, orders, pleadings and rulings, together with a transcript of all evidence introduced at any hearing relative thereto, or such portion of such citations, findings, judgments, motions, orders, pleadings, rulings, and evidence as the appealing parties and the Tax Commission may agree to be sufficient to present fully to the Court the questions involved. Upon request of the taxpayer, the Tax Commission shall furnish him a copy of the proceedings had in connection with the matter complained of.

(c) As a condition precedent to the right of the taxpayer to prosecute such an appeal, and as a jurisdictional prerequisite of the Supreme Court to entertain such appeal, it is specifically provided that, if the appeal be from an order, judgment, finding, or ruling of the Tax Commission assessing a tax or an additional tax, penalties, and interest, the taxpayer shall pay to the Tax Commission the amounts assessed. If, upon a final determination of the appeal the order assessing such tax, penalties, and interest is reversed or modified and it is determined that said tax or part thereof was erroneously or illegally assessed, said amounts so paid by the taxpayer, together with the interest thereon at the rate of three percent (3%) per annum, shall be refunded to the taxpayer by the Tax Commission.

(d) Such refunds and interest thereon shall be paid by the Tax Commission out of monies in the Tax Commission clearing account from subsequent collections from the same source as the original tax assessment, provided that in the event there are insufficient funds for refunds from subsequent collections from the same source, the refund shall be paid by the Tax Commission from monies appropriated by the Legislature to the special refund reserve account for such purposes as hereinafter provided. There is hereby created within the official depository of the State Treasury an agency special account for the Tax Commission for the purpose of making such refunds as may be required under this section, not otherwise provided. This account shall consist of monies appropriated by the Legislature for the purpose of making refunds under this section.

(e) In lieu of the cash payment provided for in the preceding paragraph, the taxpayer may file with the Tax Commission a bond in double the amount of the tax, additional tax, penalties and interest so assessed, conditioned that he will faithfully and diligently prosecute such appeal to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, will pay such tax, additional tax, penalties and interest, and costs so assessed against him.

(f) If the appeal be from an order, judgment, finding or ruling of the Tax Commission other than one assessing a tax and from which a right of appeal is not otherwise specifically provided for in this article, any aggrieved taxpayer may appeal from any such order, judgment, finding or ruling as provided in this section and may supersede the effect of such order, judgment, ruling or finding by filing with the Tax Commission a bond in an amount fixed by the Tax Commission payable to the State of Oklahoma conditioned that such appeal will faithfully and diligently be prosecuted to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, that such person will immediately conform thereto.

(g) This section shall be construed to provide to the taxpayer a legal remedy by action at law in any case where a tax, or the method of collection or enforcement thereof, or any order, ruling, finding or judgment of the Tax Commission is complained of, or is sought to be enjoined in any action in any court of this state or the United States of America.

§ 227. Erroneous payments — Claims for refund.

(a) Any taxpayer who has paid to the State of Oklahoma, through

error of fact, or computation, or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest.

(b) Any taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof if such payment was made through error of fact or computation, or within one (1) year from the date of payment thereof if such payment was made through misinterpretation of law, file with the Tax Commission a verified claim for refund of such tax so erroneously paid.

Said claim so filed with the Tax Commission shall specify the name of the taxpayer, the time when and period for which said tax was paid, the nature and kind of tax so paid, the amount of the tax which said taxpayer claimed was erroneously paid, the grounds upon which a refund is sought, and such other information or data relative to such payment as may be necessary to an adjustment thereof by the Tax Commission. It shall be the duty of the Commission to determine what amount of refund, if any, is due as soon as practicable after such claim has been filed and advise the taxpayer about the correctness of his claim. Provided, the provisions of this section shall not apply: (1) to refunds of income tax erroneously paid, refunds of which tax shall be payable out of the income tax adjustment fund as provided by law; (2) to estate tax because the payment of such tax is covered by an order of the Tax Commission and the estate and interested parties are given notice that Commission's position and computation of the tax will become final unless they protest and resist the payment thereof as provided by statute; nor, (3) in any case where the tax was paid after an assessment thereof was made by the Tax Commission which assessment became final under the law.

§ 228. Hearings on claims for refunds.

(a) Upon the demand of the taxpayer, the Oklahoma Tax Commission shall set the claim for refund authorized in the preceding section down for hearing within sixty (60) days after the filing thereof, of which time of hearing the taxpayer shall be duly notified.

If, upon such hearing, the Tax Commission finds that such tax was erroneously paid through mistake of fact, or computation or misinterpretation of law, it shall enter its written order allowing said claim for refund, which refund may be paid to the taxpayer as provided by law, or credited against any taxes due or to become due by the taxpayer as the case may be; otherwise, the Tax Commission shall deny said claim. The taxpayer shall have the right of appeal

to the Supreme Court from a decision of the Commission denying said claim for refund as provided in Section 225 of this article.

(b) Any order entered by the Tax Commission, disallowing a claim for refund, shall become final within thirty-one (31) days from the date it is entered, unless an appeal is prosecuted therefrom, in which event said order shall not become final until the appeal shall have been determined. In the event the Tax Commission allows said claim for refund, it shall pay the claimant the amount of refund, so allowed out of funds in the official depository clearing account of the Tax Commission, derived from collections in said fund from the same source from which the overpayment occurred; and an appropriation of so much of said fund as is necessary to pay said claims for refund erroneously paid or collected is hereby made; provided, that in the case of refunds due hereunder to taxpayers who are required to remit taxes to the Tax Commission on a monthly or quarterly basis, the Commission may, in lieu of a refund of the tax erroneously paid, credit the account of the taxpayer for such amount.